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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

RICHARD TRACY HENRY,

Plaintiff,

v.

HEATHER SHIRLEY,

Defendant.

Case No. 2:23-CV-03707-CAS-(SK)

**ORDER ACCEPTING FINDINGS
AND RECOMMENDATIONS OF
UNITED STATES MAGISTRATE
JUDGE**

I. INTRODUCTION

On November 7, 2024, United States Magistrate Judge Steve Kim (the “Magistrate Judge”) issued a Report and Recommendation denying petitioner Richard Henry’s (“petitioner”) petition for a writ of habeas corpus. Dkt. 35 (“R&R”). On December 2, 2024, petitioner filed his objections to the R&R. Dkt. 36 (“Objections”).

Pursuant to 28 U.S.C. § 636, the Court has reviewed the records and files herein, the R&R of the Magistrate Judge, and petitioner’s Objections thereto. After

1 having made a *de novo* determination of the portions of the R&R to which
2 plaintiff's objections were directed, the Court accepts the report, findings, and
3 recommendations of the Magistrate Judge.

4 **II. BACKGROUND**

5 In November 2017, petitioner participated in the armed robbery of a
6 marijuana dispensary. R&R at 2. While he and his co-defendants took cash and
7 property from the dispensary, he restrained three of the store's employees at
8 gunpoint. Id. at 3. In total, there were four employees in the dispensary and one
9 receptionist. Id. Petitioner was charged with five counts of robbery, one charge
10 for each employee. Id. at 4. The State argued that petitioner had prior qualifying
11 convictions pursuant to the three strikes statute and that petitioner had personally
12 used a firearm to facilitate each robbery, under California Penal Code § 12022.5.
13 Id. at 4.

14 It took the prosecution three tries to successfully file the charges and
15 sentencing allegations. Id. First, the complaint was dismissed because a
16 prosecutor who was new to the job had mishandled the calling of witnesses for a
17 preliminary hearing that had been continued. Id. The second complaint was also
18 dismissed, but only after petitioner had answered the complaint at a successful
19 preliminary hearing. Id. A judge other than the judge who presided over the
20 preliminary hearing later concluded that the DNA evidence used to identify
21 petitioner at the preliminary hearing should have been authenticated by a DNA
22 analyst and not via the hearsay testimony of the police investigator. Id. The
23 charges were then filed a third time and petitioner moved before trial to dismiss the
24 operative criminal information based on California Penal Code § 1387.1 ("§
25 1387.1"), which provides state trial judges with discretion to dismiss successive
26 filings of criminal charges which have been filed at least twice before, but which
27 provides an exception if the charges involve a violent felony and excusable neglect

1 can explain either prior dismissal. Id. Accordingly, after a hearing in this case, the
2 trial court declined to dismiss the charges, finding that both prior dismissals were
3 caused by excusable neglect on behalf of the prosecution.¹ Id. at 4-5.

4 At a bench trial, petitioner was convicted on all five robbery counts and was
5 found to have used a firearm to commit or facilitate each robbery. Id. at 5. The
6 three-strikes allegations against petitioner were also found true.² Id. At
7 sentencing, the trial court exercised its discretion to stay the additional ten-year
8 sentence mandated by the firearm finding because, as a three-strikes offender, he
9 was already being sentenced to serve an indeterminate 125 years to life sentence.
10 Id.

11 Petitioner appealed his convictions and sentence on two grounds: (1) that the
12 trial court should have dismissed the third operative set of criminal charges against
13 him, pursuant to § 1387.1; and (2) that the firearm enhancements should not be
14 applied for employees he did not personally restrain at gunpoint. Id. at 6.

15 The facts at issue are comprehensively set forth in the R&R, thus the Court
16 does not repeat them unless relevant to the Court's decision. R&R at 2-6.

17 **III. LEGAL STANDARD**

18 “A judge of the court may accept, reject, or modify, in whole or in part, the
19 findings or recommendations made by the magistrate judge.” 28 U.S.C. §
20

21 ¹ On appeal, the California Court of Appeal (the “Court of Appeal”) affirmed,
22 finding that the trial court acted within its discretion when it did not dismiss the
23 third filing, since the first complaint was dismissed because of a mistake with
24 regard to witness coordination and the second was dismissed only when the second
25 judge required firsthand DNA authentication. Id. The Court of Appeal also
26 affirmed the application of firearm sentencing enhancements for the two
27 employees petitioner did not personally restrain at gunpoint, finding that that the §
12022.5 enhancement could legally be applied for all victims, “so long as his own
uses of a firearm aided and abetted the series of robberies committed together by
him and his accomplices.” Id. at 6.

² The Court notes that petitioner does not challenge this finding in his petition.

636(b)(1)(C); see also Fed. R. Civ. P. 72(b)(3) (stating “[t]he district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to,” and “[t]he district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions”). Proper objections require “specific written objections to the proposed findings and recommendations” of the magistrate judge. Fed. R. Civ. P. 72(b)(2). “A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made.” 28 U.S.C. § 636(b)(1)(C); see also United States v. Reyna-Tapia, 328 F.3d 1114, 1121 (9th Cir. 2003) (“The statute makes it clear that the district judge must review the magistrate judge's findings and recommendations de novo if objection is made, but not otherwise.”). Where no objection has been made, arguments challenging a finding are deemed waived. See 28 U.S.C. § 636(b)(1)(C) (“Within fourteen days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court.”). Moreover, “[o]bjections to a R&R are not a vehicle to relitigate the same arguments carefully considered and rejected by the Magistrate Judge.” Chith v. Haynes, 2021 WL 4744596, at *1 (W.D. Wash. Oct. 12, 2021).

IV. DISCUSSION

The Court agrees with the Magistrate Judge’s conclusions and reasoning. Given the broad objections lodged by petitioner, the Court addresses each element of the R&R. See Objections. As the R&R points out, the Court of Appeal decision is the relevant state court decision subject to review. Id. However, petitioner has failed to meet conditions required for habeas corpus relief from this Court. Id. at 6. First, he did not allege a violation of federal law. Id. Second, petitioner cannot relitigate any claim that was decided on the merits in state court unless the decision

1 ““was contrary to, or involved an unreasonable application of, clearly established
2 Federal law’ as determined by the Supreme Court, 28 U.S.C. § 2254(d)(1), or it
3 ‘was based on an unreasonable determination of the facts in light of the evidence
4 presented in the State court proceeding.” Id. at 6-7. Third, even if petitioner’s
5 claims were to receive de novo review, despite the § 2254(d) relitigation bar,
6 petitioner cannot secure relief unless he proves he was prejudiced by the claimed
7 federal law violation. Id. at 7. Finally, petitioner cannot receive relief for a claim
8 challenging a determination of fact by the state court, which is presumed correct
9 even on de novo review, unless that presumption is rebutted by clear and
10 convincing evidence. Id. at 7.

11 First, the Court agrees with the Magistrate Judge that petitioner’s habeas
12 claims are based on unreviewable state law questions, “[d]espite [petitioner]
13 couching them ostensibly as due process challenges.” Id. at 7. The Magistrate
14 Judge was correct to conclude that petitioner’s claims are based on his
15 disagreement with the application of California state law to his case, rather than on
16 federal law. As the R&R points out, “[f]or both claims, then, ‘a state court’s
17 interpretation of state law, including one announced on direct appeal of the
18 challenged conviction, binds a federal court sitting in habeas corpus,’” and
19 petitioner cannot ““transform a state law issue into a federal one merely by
20 asserting a violation of due process.”” Id. at 8 (quoting Bradshaw v. Richey, 546
21 U.S. 74, 76 (2005); Langford v. Day, 110 F.3d 1380, 1389 (9th Cir. 1996)).

22 Second, as noted by the Magistrate Judge, petitioner’s habeas claims are
23 foreclosed by 28 U.S.C. § 2254(d), even if the Court were to construe them as
24 cognizable federal claims because he has not shown that the Court of Appeal
25 decision contradicted, or was an unreasonable application of, clearly established
26 federal law. Id. Additionally, petitioner has not shown that the Court of Appeal
27 decision was based on an unreasonable determination of facts in the state court

1 record. Id. The Court agrees with the Magistrate Judge that petitioner has not
2 identified controlling Supreme Court precedent for the proposition that this is an
3 unreasonable application of federal law. Id. at 9. Petitioner's reliance on Hicks v.
4 Oklahoma, 447 U.S. 343 (1980) is misplaced because, as noted by the Magistrate
5 Judge, the only possible federal right created by Hicks is a procedural right, which
6 if it applied, "can only be invoked to ensure that petitioner was not arbitrarily
7 denied a judicial determination under Penal Code § 1387.1 as a matter of
8 procedural right." Id. Petitioner received all process due under § 1387.1, and
9 Hicks cannot provide an avenue to his preferred substantive outcome. Id. at 10.
10 The Court also agrees that Jackson v. Virginia, 443 U.S. 307 (1979) does not
11 apply, and that petitioner's claim is not one of sufficiency of evidence as addressed
12 by Jackson; rather his contention is that the trial court and Court of Appeal did not
13 correctly interpret § 12022.5. Id. at 10-11. Therefore, the Court cannot find that
14 the Court of Appeal decision on either basis was contrary to, or an unreasonable
15 application of, any clearly established federal law.

16 Next, the Court agrees with the R&R's finding that the remaining possible
17 avenue to relief would be that the Court of Appeal's rejection of petitioner's §
18 1387.5 claim was based on an unreasonable determination of facts under §
19 2254(d)(2). Id. at 12. As the R&R explains, there is no indication of objective
20 unreasonableness in the state court record as to the finding that at least one of the
21 two prior dismissals of the complaint against petitioner was based on excusable
22 neglect. Id. at 12-13. Accordingly, petitioner is also not entitled to relief on this
23 basis.

24 Finally, the Court concludes, as did the Magistrate Judge, that even if
25 petitioner's claims were reviewed with no deference, they would fail under §
26 2554(d). Id. at 13. The firearm enhancements under § 12022.5 were stayed at
27 sentencing and thus could not have had substantial and injurious effect as would be

1 required for relief. Id. at 13-14 (citing Brecht v. Abramson, 507 U.S. 619, 638
2 (1993); United States v. Ali, 620 F.3d 1062, 1074 (9th Cir. 2010)). The § 1387.1
3 claim also cannot survive de novo review because, as the R&R explains, “[t]he
4 trial court’s factual findings about excusable neglect are presumed correct unless
5 rebutted by clear and convincing evidence” of the kind petitioner has not put forth
6 here. Id. at 14.

7 The Court notes that petitioner seems to raise new Eighth Amendment
8 grounds for relief in his objections, contending that California’s prohibition on
9 cruel and unusual punishment has been read to bar disproportionate sentencing and
10 that given he “did not participate in Counts 1 and 4” the record does not support
11 the sentence of 125 years to life. Objections at 4. First, the Court notes that
12 petitioner raises the Eighth Amendment basis for relief for the first time in his
13 objections. Because petitioner raises the objection for the first time in his
14 objections to the R&R, this is not a proper basis on which to grant relief. Gwin v.
15 Martel, No. CV 14-6083-MWF (GJS), 2017 WL 517759, at *1 (C.D. Cal. Feb. 6,
16 2017) (“habeas claims must be raised in the Petition and before the Magistrate
17 Judge in the first instance, and they are not properly brought before the Court
18 in objections to a Magistrate Judge's report and recommendation”) (citing
19 Greenhow v. Secretary of Health & Human Servs., 863 F.2d 633, 638-39 (9th Cir.
20 1988) overruled on other grounds by United States v. Hardesty, 977 F.2d 1347,
21 1348 (9th Cir. 1992) (en banc) (per curiam)). Additionally, the Court concludes
22 that on the merits, the Supreme Court has found similar sentences for less serious
23 crimes to be proportionate. See, e.g., Ewing v. California, 538 U.S. 11, 28 (2003)
24 (holding that a three strikes sentence of 25 years to life was not unconstitutionally
25 disproportionate to petitioner’s offense of stealing three golf clubs or \$1200 of
26 merchandise following two other violent or serious felony convictions). Therefore,
27 the Court concludes that relief is not warranted on this basis.

1 **V. CONCLUSION**

2 Having completed its review, the Court accepts the findings and
3 recommendations set forth in the R&R.

4 Accordingly, petitioner's application for a writ of habeas corpus is
5 **DENIED.**

6
7 Dated: May 27, 2025



8 CHRISTINA A. SNYDER
9 United States District Judge